

E-mail comment received September 1, 2006

September 1, 2006

NEPA Modernization (EMS-NEPA),
ATTN: Associate Director for NEPA Oversight
722 Jackson Place NW, Washington DC 20503

Comments sent via electronic mail per that option outlined in the Federal Register

Dear Associate Director for NEPA Oversight,

The Utah Environmental Congress (UEC) appreciates this opportunity to provide comments in response to the CEQ's July 17, 2006 Federal Register Notice and Request for Comments. UEC is interested in and has concerns with the proposal described and offers the following comments.

We support the development of management mechanisms whereby agencies can track the implementation of their commitments made under NEPA. We believe that developing additional tools to track commitments, their implementation, and their efficacy is important for effective conservation of wildlife populations/habitats as well as conservation and preservation of forest and water resources. As you know there are other mechanisms comparable to an EMS, as well as existing mechanisms that are unutilized and/or disregarded that can fulfill those goals when they are applied. The document should make that clear.

The proposal in its current form will lead directly to failures to: communicate with the public; coordinate with federal or state agencies with jurisdiction by law or special expertise; and consider the input of co-operating agencies. An Environmental Management System has no legal requirements for the preceding coordination. Under the statute, and CEQ regulations and guidance, NEPA ensures they will take place.

Some more specific concerns:

The table "Complementary Elements of the Environmental Management System and National Environmental Policy Act Processes, Communication" states on page 11 in Column 1 that An organization has discretion about communicating externally on significant environmental aspects; however, federal agencies are in a special position to emphasize the importance of ongoing communication and cooperation with the public and interested parties. In Column 2 the document states: in progress toward meeting ROD or FONSI requirements/commitments may be shared with the public as part of the ongoing EMS communication procedures; comments received during the NEPA review process may provide useful insight when developing objectives; the EMS can (emphasis added) be used as a platform for ongoing communication and cooperation with the public and interested parties. The regulatory requirements for communication which are spelled out in column 3 are not incorporated into column 2, which purports to represent examples of the complementary nature of an EMS and NEPA. If an agency adopts an EMS process which can be used to meet statutory or regulatory requirements, without

incorporating the communication requirements of NEPA, fish, wildlife, and plant resources may not be adequately addressed until an egregious violation is reported or discovered, or until such time as ecosystems have been considerably degraded. We believe the usefulness of an EMS as a tool to foster the goals of NEPA is limited if the communication requirements of NEPA are not also requirements in those EMS items which are related to the NEPA processes.

In addition, an EMS does not adequately address or recognize the complexities of biological systems within the context of an interagency process, nor was it designed to do so. It can be a useful tool for managing an agency's processes, but should not be used in lieu of the best available science, public/interested party comment, or the consultative process.

The document should provide additional wording cautioning against use of an EMS to supplant statutory or regulatory requirements or authorities, because EMS has not been demonstrated to be functionally equivalent to statutes or regulations. In fact, one of the key points of ISO14001, the standard for EMSs, is that it is voluntary.

We believe the language of the document, page 3, first paragraph, that NEPA has been "viewed as a non-recurring process focused on a specific proposal that terminates with the decision on whether and how to proceed with the proposed action", implies this limitation is somehow intrinsic to NEPA. That also conflicts with Forest Service Handbook (FSH) 1909.15 NEPA implementing procedures. We recommend you re-word the paragraph to indicate the limits have been due to some specific implementing agencies, lack of clear guidance from CEQ regarding how to incorporate NEPA decisions into their continuing processes, and because the courts have, by and large, interpreted NEPA as a strictly procedural law.

Page 4, paragraph 2: The document states: "Finally, it is conceivable that a well constructed EMS can include all the elements of the NEPA process and serve as the basis for complying with NEPA requirements." This statement is confusing, and literally directly conflicts with the on the ground reality UEC has observed with the 4 EMS's recently developed for four National Forest Plans in Utah. If it means an agency can incorporate the results of a NEPA process, or incorporate the steps and timelines for the NEPA process into an EMS, that is supportable. But, if it means that an EMS has requirements comparable to NEPA, or has statutory, enforceable requirements as a process, that is not accurate. Please make that distinction.

We believe that our National Forest and the forests, range, water, fish, wildlife, and plant resources dependant upon them will be better served if CEQ provides agencies with guidance on reviewing their existing monitoring and reporting tools to determine how they can be revised to incorporate the capabilities of an EMS and to complement the requirements and processes of NEPA.

EMS is not a functional equivalent of NEPA and the document must make that clear.

- As alluded to earlier, UEC has had some recent experiences with the EMS development for four National Forests in the state of Utah. (EMS's with a minimum scope of the forest planning process are required to be established by the 2005 National Forest Management Regulations.) We will take the Manti-La Sal N.F. EMS as one typical example: It has been developed and is

currently operating and going through various audits with NO public input, period. UEC has requested opportunity to review, comment and provide input on the development of this Forest's EMS, but has been denied even access to view the EMS at all points. Forest Planners even say the EMS, which is currently operating, is not subject to FOIA on the grounds that it is a continually evolving document, and not a static document such as that which is subject to release under the FOIA. In our practical experience, development and implementation of EMS's on National Forests are strictly 'closed door' operations, yet EMS is used to guide the development and implementation of each Forest Plan. In light of how National Forests have and are implementing their EMS's on the ground with NO public comment whatsoever, it is laughable that the CEQ would imply that EMS could in some way serve as a substitute for the NEPA process in National Forest land and resource management plan development or implementation.

Sincerely,

Kevin Mueller,
Executive Director

Kevin Mueller
Utah Environmental Congress
1817 South Main, Suite 10
Salt Lake City, UT 84115
(801)466-4055
www.uec-utah.org